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7 Attorneys for Plaintiff
 8 TA CHONG BANK LTD.

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 TA CHONG BANK LTD.,

14 Plaintiff,

15 vs.

16 HITACHI HIGH TECHNOLOGIES AMERICA,
 17 INC., a Delaware corporation; and DOES 1
 18 through 10, inclusive,

19 Defendants.

20 No. C-08-02452-PJH

21 **NOTICE OF MOTION AND MOTION OF
 22 PLAINTIFF TA CHONG BANK LTD. TO
 23 ALTER OR AMEND JUDGMENT
 24 PURSUANT TO FED. R. CIV. P. 59(e);
 25 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

26 Date: August 27, 2008
 27 Time: 9:00 a.m.
 Ctrm: 3, 17th Floor
 Judge: Hon. Phyllis J. Hamilton

28 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

29 **I. NOTICE OF MOTION AND MOTION**

30 NOTICE IS HEREBY GIVEN that on August 27, 2008, at 9:00 a.m., or as soon thereafter as
 31 this matter may be heard, in the Courtroom of the Honorable Phyllis J. Hamilton, United States
 32 District Judge, United States District Court, Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San
 33 Francisco, California, plaintiff Ta Chong Bank Ltd. (the "Bank") will, and hereby does, move the
 34 court for an order to alter or amend the order and judgment of dismissal of the complaint herein,
 35 entered on July 3, 2008, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

1 This motion is made on the grounds that the order and judgment of dismissal were both based
 2 upon a manifest error of fact or law which justifies the grant of a Rule 59(e) motion, vacating the
 3 order and judgment of dismissal and entering an order denying the motion to dismiss the Bank's
 4 complaint. *Turner v. Burlington Northern Santa Fe Railroad Company*, 338 F.3d 1058, 1063 (9th
 5 Cir. 2003).

6 Specifically, the order granting defendant Hitachi High Technologies America, Inc.'s
 7 ("Hitachi") motion to dismiss the Bank's complaint pursuant to Rule 12(b)(6) of the Federal Rules of
 8 Civil Procedure was premised upon a clear and significant misunderstanding of the facts of this case.
 9 The court mistakenly determined, contrary to the allegations of the complaint (which must be
 10 accepted as true by the court in ruling on the motion to dismiss), both that the Hitachi invoices that
 11 the Bank is seeking to recover on (the "Invoices") *remained unpaid* on the date that CyberHome
 12 Entertainment, Inc. ("CyberHome") filed for bankruptcy relief and that the Invoices were paid by
 13 Hitachi to the bankruptcy trustee *after* the filing of CyberHome's bankruptcy case. The Bank
 14 concurs that the court's decision would be correct if the payment by Hitachi on the Invoices had been
 15 made after CyberHome's bankruptcy case was filed. The situation would then be the same as with
 16 respect to the other receivables of CyberHome that remained unpaid as of the date of its bankruptcy
 17 filing, which the bankruptcy trustee became entitled to collect after the Bank's security interest was
 18 avoided with respect to receivables that remain unpaid pursuant to 11 U.S.C. §§ 547(b) and 544(a).
 19 However, these are not the facts of this case or the facts alleged in the Bank's complaint.

20 The gravamen of the Bank's complaint is that Hitachi improperly paid \$1.2 million directly to
 21 CyberHome (in satisfaction of the Invoices) on or about January 13, 2006, instead of to the Bank as it
 22 was required to do under applicable law, which payment date was long before CyberHome's
 23 bankruptcy case was filed on September 5, 2006. On these facts, the Invoices did not remain unpaid
 24 as to CyberHome or its bankruptcy estate (as CyberHome's successor) on the date of its bankruptcy
 25 filing and, accordingly, neither CyberHome nor its bankruptcy trustee has any claim against Hitachi
 26 with respect to the Invoices and, moreover, have not even asserted any such claim against Hitachi.
 27 Under these circumstances, CyberHome's bankruptcy estate has absolutely no interest in the subject
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1 matter of this lawsuit and CyberHome's bankruptcy case does not in any way limit the Bank's right
 2 to pursue Hitachi for its wrongful prepetition payments on the Invoices to CyberHome instead of the
 3 Bank.

4 Further, the preference avoidance judgment against the Bank has absolutely no effect on the
 5 Bank's rights against Hitachi and no relevance to this lawsuit. A preference action only effects
 6 property of the bankruptcy estate and does not retroactively impair rights and duties with respect to
 7 non-estate property (such as the Bank's claims herein) and/or matters that occurred long before the
 8 bankruptcy case was filed.

9 Accordingly, the Bank's complaint states a valid cause of action against Hitachi and the order
 10 dismissing the Bank's complaint and the judgment thereon should be vacated.

11 This motion is based upon this Notice of Motion and Motion and supporting Memorandum
 12 of Points and Authorities, the proposed Order granting the Bank's motion attached hereto as Exhibit
 13 A, the pleadings and papers filed in this case, and such further evidence and arguments as may be
 14 presented prior to or at the time of the hearing of the motion.

15 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

16 **1. CyberHome's Bankruptcy Estate Has No Property Interest in the Bank's Claims**
 17 **Against Hitachi.** Pursuant to 11 U.S.C. § 541(a), a debtor's bankruptcy estate consists of all legal or
 18 equitable interests of the debtor in property at the time the case is commenced. A chapter 7 trustee
 19 succeeds only to the rights possessed by the debtor at the time the petition in bankruptcy is filed, and
 20 is subject to such claims and defenses as might have been asserted against the debtor but for the
 21 filing. *See Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 656, 662 (4th Cir. 1985) (trustee
 22 acquires rights possessed by bankrupt corporation); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213
 23 (7th Cir. 1984) (whatever rights debtor has in property at commencement of case continue in
 24 bankruptcy, "no more, no less"; § 541 is not intended to expand the debtor's rights against others
 25 beyond those existent at the commencement of the case); *In re Brown*, 734 F.2d 119, 124 (2d Cir.
 26 1984) (bankruptcy estate can have no greater interest in property than the interest held by the debtor
 27 when the petition was filed). Here, as of the date of its bankruptcy petition, CyberHome (and, as a
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1 result, its bankruptcy estate) had no conceivable property interest in either the Invoices or the Bank's
 2 claims against Hitachi since CyberHome had received payment in full of the Invoices from Hitachi
 3 prior to the filing of its bankruptcy petition. CyberHome was the beneficiary of this improper
 4 payment from Hitachi and, as such, has no claim against Hitachi on the Invoices (which were paid to
 5 it) or for the improper payment it received from Hitachi. In fact, the opposite is likely the case and
 6 Hitachi may have a claim against CyberHome for reimbursement.

7 **2. The Chapter 7 Trustee's Preference Action Against the Bank is Irrelevant to the**
 8 **Bank's Claims Against Hitachi.** Under the California Commercial Code, the Bank was required to
 9 perfect its security interest in the CyberHome accounts receivable (assigned to it under the factoring
 10 agreements between the Bank and CyberHome (the "Factoring Agreements")) in order to establish
 11 the priority of its interest as against competing secured creditors that were perfected and any future
 12 bankruptcy trustee. Here, the Bank filed its financing statement within ninety (90) days of
 13 Cyberhome's bankruptcy filing. Accordingly, CyberHome's chapter 7 trustee filed a preference
 14 action against the Bank pursuant to 11 U.S.C § 547(b) and obtained a judgment against the Bank.
 15 The effect of this was to make the Bank an unsecured creditor against the bankruptcy estate and to
 16 permit the chapter 7 trustee to collect all receivables that still existed as of the date of the bankruptcy
 17 filing. However, this judgment does not extend to or have any effect on anything that occurred pre-
 18 bankruptcy (except the avoidance of the Bank's financing statement filed within the ninety (90) day
 19 preference period). It most certainly does not limit or alter the Bank's rights with respect to the
 20 millions of dollars of transactions that occurred in the years prior to bankruptcy under the Factoring
 21 Agreements. Moreover, the preference avoidance judgment does not give the bankruptcy estate a
 22 property interest in either the subject Invoices or the Bank's claims herein against Hitachi. As
 23 discussed above, CyberHome had no interest therein when its petition was filed (since it had received
 24 payment in full on the Invoices) and, as a result, neither does the bankruptcy trustee. The bankruptcy
 25 trustee is limited to recovering the CyberHome receivables that remained unpaid as of the bankruptcy
 26 petition date. The subject Invoices are not among those and the Bank's claims against Hitachi for its
 27 wrongful payment to CyberHome are personal to the Bank and not maintainable by either
 28

1 CyberHome or the bankruptcy trustee.

2 Moreover, a preference avoidance action does not retroactively avoid a security interest
 3 (which, as discussed below, is fully enforceable outside of bankruptcy even if unperfected) as to past
 4 events and/or non-estate property. Instead, it is limited in its effect to property of the debtor that can
 5 be recovered by the preference avoidance statutes and property of the bankruptcy estate.

6 Finally, 11 U.S.C. § 547(b) cannot be used to augment what is property of the estate. A
 7 property interest of the prepetition debtor exists for 11 U.S.C. § 547(b) purposes if, but for the
 8 challenged transfer, the debtor's interest would have been property of the estate under 11 U.S.C. §
 9 541 at the time of the filing of the chapter 7 petition. *Ralar Distrib. v. Rubbermaid (In re Ralar*
 10 *Distribs.*), 4 F.3d 62 (1st Cir. 1993). Clearly, this test is not met with respect to the Bank's claims
 11 herein.

12 **3. The Nonperfection of the Bank's Security Interest During Most of the Prepetition**
 13 **Timeframe is Immaterial to its Rights Against Hitachi.** The failure to perfect a security interest
 14 does not nullify the interest. *Turbinator, Inc., v. Superior Court*, (1995) 33 Cal. App. 4th 443, 450-
 15 451. Under Commercial Code § 9201(a), "a security agreement is effective according to its terms
 16 between the parties, against purchasers of the collateral, and against creditors." The Commercial
 17 Code contains no requirement of perfection. "Thus, an unperfected security interest is enforceable
 18 against all parties *unless* the holder of a later-acquired interest qualifies under some other provision of
 19 the Code. The unperfected interest is *not* null and void. For example, an unperfected security
 20 interest will defeat the interest of an unsecured general creditor." *Id.* The only requirements for
 21 validity against the debtor and third parties are those set out in Commercial Code § 9203(b), a signed
 22 agreement, value given, and the debtor's rights in the collateral (meaning the Invoices at the time of
 23 their issuance). Once, as here, these requirements are met, the security interest is enforceable.
 24 Perfection merely establishes the security interest's priority as to other secured creditors and makes it
 25 safe against certain other transferees of the collateral and a bankruptcy trustee. *Id.*

III. CONCLUSION

Based upon the foregoing authorities and argument, Ta Chong Bank respectfully submits that the court should enter an order (i) granting the Bank's motion to alter or amend the order and judgment of dismissal of the complaint pursuant to Rule 59(e), (ii) vacating the order and judgment of dismissal entered on July 3, 2008, (iii) denying Hitachi's motion to dismiss the complaint, and (iv) for such other and further relief as the court deems just and proper.

DATED: July 18, 2008

Respectfully submitted,

MONROE LAW GROUP

By: /s/ James S. Monroe
James S. Monroe
Attorneys for Plaintiff
TA CHONG BANK LTD.

PROOF OF SERVICE

CASE NAME: Ta Chong Bank Ltd. vs. Hitachi High Technologies America
COURT: USDC, Northern District of California
CASE NO.: C-08-02452-PJH

I, the undersigned, certify that I am employed in the City and County of San Francisco, California; that I am over the age of eighteen years and not a party to the within action; and that my business address is 101 California Street, Suite 2450, San Francisco, CA 94111. On this date, I served the following document(s):

**NOTICE OF MOTION AND MOTION OF PLAINTIFF TO ALTER OR AMEND
JUDGMENT PURSUANT TO FED. R. CIV. P. 59(e); MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF.**

on the parties stated below, by placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

X : By First-Class Mail — I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the United States Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in San Francisco, California, for mailing to the office of the addressee following ordinary business practices.

____: By Personal Service — I caused each such envelope to be given to a courier messenger to personally deliver to the office of the addressee.

____: By Overnight Courier — I caused each such envelope to be given to an overnight mail service at San Francisco, California, to be hand delivered to the office of the addressee on the next business day.

____: By Facsimile — From facsimile number at A.M./P.M., I caused each such document to be transmitted by facsimile machine, to the parties and numbers listed below, pursuant to Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration.

Addressee(s)

Richard C. Vasquez, Esq.
Vasquez Benisek & Lindgren LLP
3685 Mt. Diablo Blvd., Suite 300
Lafayette, CA 94549

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 18, 2008, at San Francisco, California.

/s/ James S. Monroe

EXHIBIT A

1 James S. Monroe (SBN 102328)
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14 HITACHI HIGH TECHNOLOGIES AMERICA,
 15 INC., a Delaware corporation; and DOES 1
 through 10, inclusive,

16 Defendants.

17 No. C-08-02452-PJH

18
**[PROPOSED] ORDER GRANTING
 PLAINTIFF'S MOTION TO ALTER OR
 AMEND JUDGMENT PURSUANT TO FED.
 R. CIV. P. 59(e)**

19 Date: August 27, 2008

20 Time: 9:00 a.m.

21 Ctrm: 3, 17th Floor

22 Judge: Hon. Phyllis J. Hamilton

23 This matter came on regularly for hearing before the court on plaintiff Ta Chong Bank Ltd.'s
 Motion to Alter or Amend Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

24 Upon consideration of the motion and the opposition thereto, as well as arguments made at
 the hearing, IT IS HEREBY ORDERED that: (1) plaintiff's motion to alter or amend the order and
 judgment of dismissal of the complaint is granted; (2) the order and judgment of dismissal, entered on
 July 3, 2008, are vacated; (3) defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6)
 is denied; and (4) defendant shall have ___ days leave to answer the complaint.

25 Date: _____

26
 27 Honorable Phyllis J. Hamilton
 28 United States District Judge